1967

Double "D" Amusement Company v. William B. Hawkins : Appellant's Brief

IN THE SUPREME COURT OF THE STATE OF UTAH

DOUBLE "D" AMUSEMENT COMPANY, a Corporation,
Plaintiff and Respondent,

vs.

WILLIAM B. HAWKINS,
Defendant and Appellant.

Case No. 10938

APPELLANT'S BRIEF

Appeal from Judgment of the Fourth District Court of Utah County
HON. MAURICE HARDING, Judge

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CASES AND AUTHORITIES

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NATURE OF THE CASE

This is an action for damages for breach of contract. Plaintiff is a corporation and plaintiff's principal business was that of leasing and operating amusement devices, vending machines, and record playing machines. Plaintiff claims that defendent wrongfully breached a music machine location contract, which contract pro-

vided that a machine owned by plaintiff was to remain in the defendant's place of business for a period of five years.

DISPOSITION OF THE CASE IN LOWER COURT

The trial Court entered judgment against the defendant for the amount of $1,332.75 together with interest from the 1st day of July, 1964, in the amount of $226.53.

THE NATURE OF RELIEF SOUGHT ON APPEAL

Defendant, appellant, seeks reversal of the trial Court's judgment upon the question of damages, on the theory that the plaintiff failed to introduce competent evidence as to his damages, if any.

STATEMENT OF FACTS

The plaintiff is a corporation engaged in the business of renting amusement machines, operating cigarette and candy vending machines, and music machines. Plaintiff had eighty-three machines in operation during the period in question (Tr. 24).

Defendant is the owner and operator of a lounge known as the L-Roy Tavern and Lounge, located in Orem, Utah.

Plaintiff and defendant entered into a written agreement dated October 16, 1963, which contract was admitted in evidence as Exhibit A.

The machine described in Exhibit A was placed in defendant's place of business, pursuant to the contract, in October of 1963, and it remained in the defendant's place of business until September of 1964. In September of 1964 the machine was removed from the defendant's premises.

There have been two trials in this matter. At the conclusion of the first trial, the Court awarded damages against the defendant in the amount of $560.00. A new trial was granted and in the second trial the Court awarded damages against the defendant in the amount of $1,332.75 together with interest.

Defendant believes that the weight of the evidence on the question of breach of contract favored the defendant. Since the evidence was in conflict, and there is competent evidence on which the Court's decision on that matter can be supported, defendant does not appeal from that finding.

The second trial was conducted on the theory that the Court had already determined that defendant was liable for breach of contract. For that reason, the transcript does not reflect the evidence in full as it relates to the question of breach of contract.

The record of the first hearing was not transcribed nor transmitted to the Court on appeal. The record on

this appeal does not show, but I think that respondent's counsel will not question the fact, that the only records which were kept with respect to the machine which operated on the defendant's premises were records showing the collection of monies from the machine.

The practice of the plaintiff was to make weekly collections, divide the receipts of the machine with the defendant, and issue a written collection report to the defendant showing the amount of money in the machine and the manner of its division.

Aside from that record, the plaintiff did not have any business records which showed either the income or the cost of operating the particular machine in question. This is shown on page 8 of the Transcript by plaintiff's witness, Arvid Dodge, a certified public accountant and plaintiff's accountant:

> "Q (By Mr. Young) I don't know whether the Judge heard or not. You told me that you had no records that reflected or that related to this particular machine, except for those records which you furnished to me?
>
> "A That's right, which was pertaining to the depreciation itself.
>
> "Q Or to its income, isn't that right?
>
> "A This is right.
>
> "Q And you had no records that related to expenses that related to this particular machine?
>
> "A That's correct.
>
> "Q So this is sheer guess work?

"A That is what the statement says. It's an estimated amount."

The foregoing testimony referred to the plaintiff's Exhibit A-3, which was at first rejected by the Court but later received as evidence of loss of profits.

The plaintiff's witnesses were its two principal owners, David L. Wade and J. Dwain Westphal, and its accountant, Arvid Dodge.

Plaintiff's business had a net operating loss in the years both before and after the inception of the contract here sued upon (Tr. 33). Wade's testimony reads as follows:

"Q (By Mr. Young) Now, did the plaintiff pay any tax to the Federal Government in any one of those years?

"A You mean income tax?

"Q No. Income tax?

"A Because it showed a net loss.

"Q So you had a loss in all of those years?

"A That's right.

"Q On the 83 machines?

"A That's right.

"Q Is that right?

"A That's right."

The plaintiff did not keep records of either receipts or expenses with respect to the individual 83 machines.

The plaintiff's witness, Wade, also testified in answer to plaintiff's counsel that the plaintiff had no records relating to the expenses of individual machines. At Transcript, page 28, he testified as follows:

> "Q Would the repairs and maintenance cost, as shown on Exhibit A-3 have been different for this machine than for other machines, in your ownership at that time?
>
> "A Yes, sir. I don't believe there is any way that even if you have to break them down so there was, let's say 25 juke boxes and 15 cigarette machines and a dozen pinball machines and you break it down, there is no way that you can get at a definite figure to go on the one machine, because when you buy one record, you buy records for all machines. And when we buy a part for a machine, we don't attribute it to any one given machine. So the only argument we have is if you use all music machines or just all machines, the only thing we can do is attribute all the cost of the machines — or of the route to these machines.
>
> "And I think that we are over attributing to this one machine, because I don't believe it would take the amount of maintenance and repairs and costs that we are attributing to it, because we had a lot of older machines that have taken considerably more maintenance.
>
> "And the depreciation is broken down definitely on the machine itself."

The plaintiff owned three machines exactly like the one described in plaintiff's Exhibit A-1 and which is the subject of this suit (Tr. 50). Plaintiff did not know what happened to the machine after it was taken

out of the place of business (Tr. 51). Probably the plaintiffs were not without the services of the machine in question for more than three weeks. At page 52 of the Transcript the Court asks the witness Wade the question:

> "Q How long were you without the services of the one machine?
>
> "A Now, of the individual machine, we were probably not without the services of it very long. But, of course, when we had it in service, we were having one of our machines out of service. Just the individual machine, I wouldn't say more than two or three weeks.
>
> "Q How long were you without the services of these three machines that you had like this one?
>
> "A Well, now, the one machine has never been without service, because it went into The Wilshire, and it was traded back on the next model that came back.
>
> "And the other two machines, of course, being that they were newer machines, we have kept them more or less in operation, and kept the older ones off from operation, because we didn't want them to sit in the shop. We figured the potential was a little better on the newer ones than it was on the older ones. We just thought that they would do a little better, because they had the thirty-three and a third and the forty-five, and you could play mixed records and things like this, and we figured it would help to give it a little better chance to stay on location. So we moved them out and moved the other ones in."

The record does not show what the income of the machines was following the date of the removal of the

plaintiff's machine from the defendant's premises or at any time other than while one machine was located in defendant's place of business.

When the newer machine, which was taken from defendant's place of business, was put into operation, an older machine was taken out of operation and put in plaintiff's warehouse (Tr. 53).

The nature of Dodge's testimony can be fully understood when it is known that Dodge was the accountant for the plaintiff and yet took as his figure in arriving at the loss of the plaintiff, a figure furnished to him by the plaintiff's counsel.

At page 21 of the Transcipt the Court inquired how the plaintiff had made the determination of a loss of $67.50 per month of income:

> "Q (By the Court) You don't know how many of these are music machines and how many are not?
>
> "A Not off hand, I don't.
>
> "Q May I ask where you got the figures that were on that statement, the other one that we excluded? The figures to begin with, sixty-seven fifty per month?
>
> "A I believe this was the one (indicating)?
>
> "Q Yes. Fifty-four fifty. No, sixty-seven fifty per month.
>
> "MR. HOWARD: Your Honor, I will tell you where he got that. I furnished that to him because that was your computation.

"And our computation was $7.90.

"And when you calculated it on the basis of the average, and when you made your last decision, you determined that there was an income of $67.50 per month.

"THE COURT: I wondered who had been reading my notes.

"MR. HOWARD: Well, I might as well roll with the punches. That is what your calculations were, and I read it down and figured it was $67.50, and that was the finding of the Court on that, and we calculated what the Court had written on that."

The balance of the record demonstrates clearly that the plaintiff did not keep any records as to his expenses for the individual machines.

ARGUMENT

POINT I

THE TRIAL COURT ERRONEOUSLY AND OVER OBJECTION ADMITTED CONJECTURAL AND SPECULATIVE EVIDENCE AS TO THE LOSS OF PROFIT RESULTING FROM THE BREACH OF CONTRACT.

The law respecting the degree of certainty required to establish loss of profits is stated in *A.L.I. "Restatement of the Law of Contracts," Sec. 331.* That section reads as follows:

"(1) Damages are recoverable for losses caused or for profits and other gains prevented by the breach only to the extent that the evidence affords a sufficient basis for estimating their amount in money with reasonable certainty.

"(2) Where the evidence does not afford a sufficient basis for a direct estimation of profits, but the breach is one that prevents the use and operation of property from which profits would have been made, damages may be measured by the rental value of the property or by interest on the value of the property."

So far as we have been able to determine, there is no jurisdiction which disagrees with the statement of the law as enunciated in the Restatement. Many authorities in support of the Restatement's position are cited in *15 A. J. 556 "Damages,"* Sec. 149 and 150. Another way of stating the rule announced by the Restatement is that profits in order to be recoverable may not be uncertain, contingent, conjectural, or speculative. This is the law in Utah, ***B. T. Moran, Inc. v. First Security Corporation,*** 24 P. 2d, 384.

It is familiar law that the testimony of a witness is no stronger than as shown by cross-examination. *Edwards v. Clark,* 83 P. 2d, 1021; *Oberg v. Sanders,* 184 P. 2d, 229; *Porter v. Hunter,* 207 Pac. 153.

Plaintiff sought to prove his damages through plaintiff's Exhibits A-3 and A-4, identified by plaintiff's witness as the product of guess work (Tr. 8).

This "Guess work" was not admitted by the Court

at the conclusion of Mr. Dodge's testimony. At page 22 of the Transcript, the Court said.

> "THE COURT: I think they are not ready yet to be offered. Let's reserve a ruling on them for the time being, and see if you can connect them up with the other witnesses."

At this juncture, if the plaintiff's evidence was tested by plaintiff's witnesses' testimony on cross-examination, the evidence of a loss was "sheer guess work" (Tr. 6-8).

The only evidence offered to qualify the exhibits following the Court's ruling that Exhibits A-3 and A-4 were not admissible, was the testimony of Wade and Westphal that in their opinion the estimates of Dodge were correct.

That Dodge's testimony was not based upon competent evidence is further demonstrated by the manner in which he, Dodge, determined the estimated income from the machine. The following appears in the Transcript on pages 21-22:

> "Q (By the Court) You don't know how many of these are music machines and how many are not?
>
> "A Not off hand, I don't.
>
> "Q May I ask where you got the figures that were on that other statement? The other one that we excluded? The figures to begin with, sixty-seven fifty per month?
>
> "A I believe this was the one (indicating)?

"Q Yes, Fifty-four fifty. No, sixty-seven fifty per month.

"MR. HOWARD: Your Honor, I will tell you where he got that. I furnished that to him because that was your computation.

"And our computation was $7.90.

"And when you calculated it on the basis of the average, and when you made your last decision, you determined that there was an income of $67.50 per month.

"THE COURT: I wondered who had been reading my notes.

"MR. HOWARD: Well, I might as well roll with the punches. That is what your calculations were, and I read it down and figured it was $67.50, and that was the finding of the Court on that, and we calculated what the Court had written on that.

"THE COURT: Very well. I arrived at it by adding everyone of the receipts you had, and dividing it by the number of weeks. No, by the number of months. I thought this looked wrong. Eight months."

It thus appears that plaintiff's experts relied upon an income for the machine which was found by the Court at a prior hearing and expenses which were estimated.

POINT II

PLAINTIFF'S DAMAGES, IF RECOVERABLE AT ALL, ARE FOR THE LOSS OF

NET PROFITS. PLAINTIFF DID NOT PROVE THE LOSS OF ANY NET PROFITS.

An action for damages for loss of profits in order to be recoverable must be for the loss of net profits. Authorities supporting this view are found on 28 ALR, page 1510. Also see *John A. Lee v. Durango Music, a co-partnership, et al,* 355 P. 2d, 1083; *Groendyke Transport ,Inc .v. Hal Merchant,* 380 P. 2d, 682; and *B. T .Moran, Inc. v. First Security Corporation, supra.*

Plaintiff's business never did operate at a profit (Tr. 33). In order for the plaintiff to recover, the plaintiff must take one of eighty-three machines and establish with reasonable certainty that that particular machine did operate at a profit. Since the whole business operated at a loss and there were no records for this individual machine, the defendant is at a loss to understand how there can be any recovery for loss of net profits.

As stated before, plaintiff owned three machines which were identical. The machine in question is one of three.

There is nothing in the record to show what the earnings of the other identical machines were. There is no way of knowing if they operated at a profit or loss except that the whole of the business operated at a loss. There is no evidence from which the Court could have concluded to what extent if any the plaintiff actually suffered damages.

The record is entirely silent with respect to the question of availability of locations for machines. The record does not show whether the plaintiff had the financial ability to obtain additional machines. The only thing that does appear from the record is that when this new machine was moved from the defendant's place of business to some other place of business, an old machine was taken off location (Tr. 52).

The proper amount of damages to be awarded in this case would be the loss of the profits from the old machine, which was taken out of service, together with the difference between the profits earned by the machine in question in the defendant's place of business and in its new location, whatever that amount might be. No effort was made in this case to establish such a figure. The Court recognized this situation when it stated the following (Tr. 53):

> "Q What I am trying to get, is how long were you deprived of the income of all three machines?
>
> "A Well, I just couldn't answer that for any certainty."

CONCLUSION

Defendant respectfully submits that there is no competent evidence in the record to support the trial Court's finding. The evidence of plaintiff in its essence consisted of Dodge's guess and of Wade and Westphal's

opinion that Dodge's guess was correct. Surely such evidence does not constitute *a reasonably* certain basis for establishing loss of net profits.

Respectfully submitted,

DALLAS H. YOUNG, JR.

Attorney for Appellant